

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**WENCESLAO HERNANDEZ**

Claimant

VS.

**MONFORT, INC.**

Respondent

Self-Insured

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Docket No. 208,012

**ORDER**

Claimant appeals from the December 20, 1996, preliminary hearing Order entered by Administrative Law Judge Kenneth S. Johnson.

**ISSUES**

The Administrative Law Judge denied the claimant's request for medical treatment to his neck, finding claimant failed to sustain his burden of proof that his neck injury is work-related. Claimant appeals that finding.

Respondent, in its brief, raises the issues of whether notice was timely given. Accordingly, the issues before the Appeals Board to review are as follows:

- (1) Whether claimant's neck injury arose out of and in the course of his employment with respondent.
- (2) Whether notice of accident was given as required by K.S.A 44-520.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing that the Order entered by the Administrative Law Judge should be affirmed to the extent it found timely notice of accident and awarded medical treatment for claimant's upper extremity injuries, but the Order should be reversed to the extent it denied claimant medical treatment for his neck injury.

(1) The Administrative Law Judge found as follows:

"The claimant has failed to sustain his burden of proof that any problem he may have with his neck is related in any way to his work, therefore, Claimant's request for medical treatment to his neck is hereby denied."

The claimant's Exhibit 1 to the preliminary hearing transcript is an August 5, 1996, report to respondent's risk management department by the authorized treating physician, orthopedic surgeon Chris Miller, M.D., which states in pertinent part:

"Mr. Hernandez complains of continued pain in his shoulder that may be related to herniated cervical disc found in his neck. This could account for the residual pain in his shoulder. It is more likely than not related to his work injury. Dr. Lewonowski will need to see him for further evaluation and treatment."

Dr. Miller's opinion is essentially uncontradicted in the record in so far as it is the only medical opinion on causation which was given after the June 13, 1996, MRI of the cervical spine, which diagnosed the C5-6 herniation and C4-5 bulging disc.

Respondent's Exhibit 1 to the preliminary hearing transcript contains Dr. Kris Lewonowski's office notes. On August 7, 1996, he noted that the June 13, 1996, MRI showed a C5-6 herniation with extrusion into the right nerve foramen which Dr. Lewonowski considered to be the likely cause of claimant's right upper extremity complaints, including the objective findings of decreased sensation over the ulnar nerve distribution of the right hand. He scheduled claimant for a EMG. The August 7, 1996, EMG report of Michael Munhall, M.D., contains the following impression:

"IMPRESSION:

1. No electromyographic evidence of cervical radiculopathy, right upper extremity, acute, subacute.
2. Electromyographic evidence of carpal tunnel syndrome, left, mild.
3. Electromyographic suggestion of peripheral neuropathy, distal, symmetrical.
4. Electromyographic suggestion of ulnar nerve irritation, bilateral elbows."

Respondent's Exhibit 1 also contains an August 22, 1996, office note by Dr. Lewonowski which refers to the August 7, 1996, EMG performed by Dr. Munhall. It did not indicate evidence of cervical radiculopathy in the right upper extremity. However,

Dr. Lewonowski did recommend a C5-6 epidural steroid injection in connection with his treatment of claimant as a workers compensation referral from respondent.

Respondent canceled the epidural steroid injections by Dr. Lewonowski and the referral to Tyrone D. Artz, M.D., recommended by Dr. Miller. Instead, an examination of claimant was performed October 22, 1996, by Gary M. Kramer, M.D., at the request of respondent. With respect to claimant's neck, shoulder, and upper extremity complaints, Dr. Kramer diagnosed symptom magnification. He did not recommend any further medical treatment. However, his report is silent with respect to the cause of claimant's herniated and bulging disc findings on the MRI.

The radiology report from the June 13, 1996, MRI of the cervical spine notes:

"IMPRESSION:

1. SUGGESTION OF SUBLIGAMENOUS DISC HERNIATION RIGHT PARACENTRALLY AT C5-6 WITH EFFACEMENT OF THE THECAL SAC AND MILD POSTERIOR DISPLACEMENT OF THE RIGHT SPINAL CORD AND MILD EXTENSION INTO THE RIGHT NEURAL FORAMEN.

2. MILD BULGING OF THE ANNULUS LEFT PARACENTRALLY AT C4-5 WITH MILD EFFACEMENT OF THE ANTERIOR THECAL SAC, BUT NO EVIDENCE OF SPINAL CORD OR NERVE ROOT IMPINGEMENT."

Claimant was seen again by Dr. Miller on October 4, 1996, for a follow-up examination on his right shoulder. His office notes mentioned that claimant had been seen by Dr. Lewonowski for his neck and a referral to Dr. Artz was recommended. That referral was denied by the workers compensation insurance carrier and/or employer. Although Dr. Miller rated and released claimant with restrictions with respect to his shoulder, he specifically stated that he agreed with the referral to Dr. Artz for an evaluation of the numbness in claimant's elbow and hand. Although the neck was not specifically mentioned in connection with the referral to Dr. Artz, it is clear that Dr. Miller was not releasing claimant with respect to his neck injury.

(2) Respondent contends that claimant did not report an accident having occurred on or about November 1, 1995, which caused injury to his back or neck within ten days of the accident as required by K.S.A 44-520. Respondent points out that there is no mention of the neck or back in the form E-1 filed December 11, 1995. That Application for Hearing alleges injury to claimant's hand, arm and shoulder from an accident in September 1995 and each day worked thereafter.

Claimant was initially sent by respondent to Myron J. Zeller, M.D. His office note of November 6, 1995, refers to claimant having "complaint of pain of both shoulders, both arms, elbows, forearms, hands and wrists. He also reports some difficulty with flexing the right ring finger."

Claimant contends that his shoulder and upper extremity complaints were related, at least in part, to his neck injury and that these symptoms prevented any diagnosis of neck problems until the MRI of the cervical spine was performed in June 1996. The above-mentioned report by Dr. Miller supports this contention.

As the Administrative Law Judge points out at page 38 of the preliminary hearing transcript, K.S.A 44-520 does not require notice of injury, but rather notice of accident. Claimant is not required to diagnose his condition, nor is he required to give a list of every body part injured. Claimant testified that he reported his symptoms to respondent in November of 1995. The fact that his shoulder and upper extremity symptoms were not determined to be causally related to the neck until sometime later is not fatal to claimant's claim. The Appeals Board finds notice was timely given.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the December 20, 1996, preliminary hearing Order by Administrative Law Judge Kenneth S. Johnson should be, and is hereby, affirmed as to the compensability of the injuries to the upper extremities and reversed as to the denial of compensability for the neck injury. This matter is remanded to the Administrative Law Judge for further proceedings and/or orders consistent with the above concerning claimant's request for medical treatment for his neck.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1997.

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BOARD MEMBER

c: Michael L. Snider, Wichita, KS  
Terry J. Malone, Dodge City, KS  
Kenneth S. Johnson, Administrative Law Judge  
Philip S. Harness, Director